In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-246

ARTHUR VELASCO, et al.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE FOURTH CIRCUIT

Donald E. Santarelli
1025 Connecticutt Avenue, N.W.
Washington, D.C. 20036

Robert B. Thompson
P.O. Box 677
Gainesville, Georgia 30501

Philip J. Starr
1025 Connecticutt Avenue, N.W.
Washington, D.C. 20036

Attorneys for Petitioners

TABLE OF CONTENTS



TABLE OF AUTHORITIES

Cases

## Statutes



## Other Authority

In The

SUPREME COURT OF THE UNITED STATES

October Term 1975

---

No.

---

ARTHUR VELASCO, et al.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

The petitioners, Arthur Velasco, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in

this proceeding on June 3, 1976.

(a)

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit was unreported. A copy of the official opinion in this case is appended hereto.

(b)

GROUNDS OF JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 3, 1976. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

(c)

QUESTIONS PRESENTED

1. Were petitioners denied due process of law as a result of:

a.) The trial court's refusal to permit petitioners to prove to a jury that the marijuana which they allegedly possessed

was not Cannabis sativa L., the substance specifically and exclusively prohibited by 21 U.S.C. § 841 (a) (1) (Possession of Marijuana), 21 U.S.C. § 963 (Conspiracy to Import Marijuana), and 21 U.S.C. § 952 (a), 960 (Illegal Importation), the statutes under which petitioners were charged;

b.) the lower courts' holdings,that, as a matter of law, all Cannabis, regardless of the species, is within the definition of marijuana when Congress has limited the definition to all of the parts of the plant Cannabis sativa L. whether growing or not, with certain exceptions;

c.) being deprived of their right to receive fair and adequate notice of criminal liability due to the uncertainty of 21 U.S.C. § 802 (15), should it be held to encompass all species of marijuana.

## QUESTIONS PRESENTED

2. Regardless of Congressional intent, by operation of the well established and clearly drawn principle of statutory construction known as Expressio unius exclusio alterius, where Congress precisely and specifically prohibits a form of conduct, and the persons and things to which it refers are designated, it is beyond the province of the judiciary to prohibit other similar classes or categories not designated by the statute.

(d)

## STATUTES INVOLVED

The relevant portions of the statutes involved and which portions are pertinent to the question presented are as follows:

Title 21, Section 209:

> It shall be unlawful for any person, firm, or corporation whose permanent allegiance is due to the United States to sell or deliver to any other person any of the following-described substances, or any poisonous compound combination, or preparation thereof, to wit: . . . Cannabis indica . . . except in the manner following, and, moreover, if the applicant be less than eighteen years of age, except upon the written order of a person known or believed to be an adult. . . .

Title 21, Section 802(15):

> The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks

or a cake made from the seeds of such plant, or any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, or, cake, or the sterilized seed of such plant which is incapable of germination.

Title 21, Section 841(a)(1):

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense, a controlled substance.

Title 21, Section 952(a):

It shall be unlawful to import into the customs territory of the United States or any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter.

Title 26, Section 4761(2):

The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds there-

of; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

D.C. Code Title 33, Section 401(m):

"Cannabis" includes all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof, the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin, including specifically the drugs known as American hemp, marihuana, Indian hemp or hasheesh, as used in cigarettes or in any other articles, compounds, mixtures, preparations, or products whatsoever . . . .

D.C. Code Title 33, Section 401(n):

"Narcotic drugs" means . . . cannabis, . . . and every substance not chemically distinguishable from them, and any compound, manufacture, salt, derivative, or preparation of . . . canna-

bis, . . . whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

(e)

## STATEMENT OF THE CASE

On September 3, 1974, eleven defendants were indicted by the Grand Jury for the United States District Court, District of South Carolina, Rock Hill Division. Two of the defendants, Mr. Cochran and Mr. Evans, were not arrested and are not involved in this petition. Three of the defendants, Mr. Bass, Mr. Dove and Mr. Wood, were acquitted. The remaining defendants, petitioners here, Mr. Zambito, Mr. Velasco, Mr. Pruitt, Mr. Moody, Mr. Tatum and Mr. Ferguson, were tried and convicted.

Three counts were contained in the indictment. The first count charged a violation of 21 U.S.C. 963, and alleged conspiracy among the defendants, together with one Mr. Escobedo, who was not indicted, to import unlawfully into the United States,

marijuana, a controlled substance.

The second count of the indictment charged a violation of 21 U.S.C. 952 (a) and 960, i.e., of importing marijuana into the United States from Colombia, South America. The third count charged a violation of 21 U.S.C. 841(a)(1), the possession of marijuana with intent to distribute. Only Mr. Ferguson and the three defendants who were acquitted were named in the third count.

On December 10, 1974, a jury trial was called, before the Honorable J. Robert Martin in the United States District Court, Columbia, South Carolina.

On December 21, 1974, the case was submitted to the jury under the instructions of the trial Court objected to by defense counsel. The jury returned its verdicts on that date finding petitioners guilty as charged.

On February 5, 1975, petitioners Zambito, Pruitt, and Moody were each sentenced to imprisonment for four years on the conspiracy count and for four years on the substantive count in which they were charged, said sentences to be served consecutively, a total of eight years.

Petitioners Velasco and Tatum were sentenced to consecutive terms of imprisonment on the same two counts for a total of four years. Petitioner Ferguson was sentenced to three consecutive one-year terms for a total of three years.

On September 26, 1975, the petition ("suggestion") for hearing en banc was denied by the United States Court of Appeals for the Fourth Circuit.

On June 3, 1976, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the trial Court.

On July 19, 1976, a petition for rehear-

ing en banc was denied by the Fourth Circuit.

During the course of the trial, the government introduced the testimony of its expert witness, Mr. Allen, for the purpose of establishing that the plant seized during the course of the investigation was marijuana, and that the same was Cannabis sativa L. The defendants tendered the testimony of their expert witness, Mr. Anderson, for the purpose of establishing that marijuana was polytypic, having more than one species. Mr. Anderson's testimony indicated that the specific species of the plant could not be determined by the tests administered by the government's expert. Therefore, the species of the plant in evidence, according to Mr. Anderson, could be any one of the three species known to the scientific community. The testimony of Mr. Anderson was ruled inadmissible, and was not heard by the jury. The trial Court then ruled that all marijuana,

regardless of its species, is marijuana prohibited by the statutes referred to in the indictment although defined therein as Cannabis sativa L. The trial Court subsequently instructed the jury that if it found the plant in evidence to be marijuana, the jury was not to be concerned with what type or species it might be, for the Court concluded as a matter of law that all marijuana fell within the ambit of the statutory prohibition.

(f)

REASONS FOR GRANTING CERTIORARI

The petitioners were found guilty of violating statutes which prohibit the possession, importation, and selling of marijuana. In 21 U.S.C. § 802 (15), the statute which defines marijuana for purposes of the statutes under which petitioners were convicted, Congress specifically describes marijuana as the plant Cannabis

sativa L.; there is no mention of any other species of marijuana in the statute. Thus, only Cannabis sativa L. is prohibited by the pertinent statutes and all other species fall outside their ambit.

It has long been established that the penal statutes are to be strictly construed. Statutes will not be read to create crimes, unless the purpose and intent to do so is plain. Criminal statutes are not to be broadened by judicial interpretation beyond the fair import of their language, and legislative omissions in criminal statutes are only to be remedied by legislative action. It is not the function of the courts to make criminal,by extending the plain language of penal statutes,acts which the legislature either overlooked, expressly omitted, or did not in fact intend to make criminal.

The courts below in the instant case and other courts referred to herein that have dis-

posed of this issue in a like manner have done so by means of judicial amendment. In so doing, the courts accelerate the decline of well founded principles of the separation of governmental powers and judicial restraint.

By extending here the meaning of the pertinent statutes beyond that expressly stated by Congress, the Fourth Circuit has subjected petitioners to penal sanctions for acts neither prohibited by Congress nor by which petitioners have been fairly and adequately put on notice by the plain words of the statute as to Congressional proscription.

At issue, among others, is whether the court erred in not allowing the jury to hear the defendant's expert's testimony regarding the species of cannabis in evidence in this case. The trial court's exclusion of such testimony from evidence created here the potential for an eventuality which the framers of the Constitution fought strenuously to avoid: judicial

intrusion into the legislative function. This Court, the bastion of Constitutional interpretation, cannot permit such egregious violation of the doctrine of separation of powers as is evidenced in the action here at Bar, without serious, long-term ramifications leading ultimately to the destruction of the doctrine of separation of powers.

This Court's affirmation of such an abuse of judicial discretion and usurpation of power could potentially reduce the role of the Congress to that of a mere suggestive mechanism, subject to the capricious amendment of its mandates by the courts, or,in the alternative, provoke the Congress into confrontation with the judiciary.

Perhaps the most crucial reason for granting the writ here sought is that the statute defining marijuana is too uncertain to satisfy due process requirements. A substantial number of courts have found

that it would have been irrational of Congress to outlaw the importation and possession of one species of marijuana but not of other species of marijuana; however, there have been a small number of courts that did not find such a distinction irrational. It is in fact the plain language of the statute that only one species of marijuana is proscribed. Such a situation leaves the ordinary person without an adequate guide for conduct.

Arguendo, it was the intent of Congress to include all marijuana by its use of the term "Cannabis sativa L.". The statute as it reads, however, does not proscribe all marijuana. The statute prohibits Cannabis sativa L, and only Cannabis sativa L., whether that word describes a particular species or the country from which the marijuana originated.

No other marijuana has been proscribed, and it is beyond the province of the judiciary to amend or attempt to correct that which Congress has ineffectually legislated.

RESTATEMENT OF QUESTIONS PRESENTED

1. Were petitioners denied due process of law as a result of:

a.) The trial court's refusal to permit petitioners to prove to a jury that the marijuana which they allegedly possessed was not Cannabis sativa L., the substance specifically and exclusively prohibited by 21 U.S.C. § 841 (a) (1) (Possession of Marijuana), 21 U.S.C. § 963 (Conspiracy to Import Marijuana), and 21 U.S.C. § 952 (a), 960 (Illegal Importation), the statutes under which petitioners were charged?

The Government's expert witness,

Mr. Andrew C. Allen, a "qualified" chemist, testified at the trial of the petitioners that he had performed a number of tests on the substance accepted into evidence and determined that it was "plant material, commonly called marijuana, specifically Cannabis sativa L." Upon cross-examination Mr. Allen testified that Cannabis is monotypic. However, Mr. Allen testified that he was qualified as a chemist, not as a taxonomist or a botanist.

Dr.Loren C. Anderson, a taxonomist who appeared for the petitioners, testified at trial that only a taxonomist or botanist is qualified to characterize the varying species of plants, and that the chemical analysis performed by Mr. Allen could not determine the species of the Cannabis. By Mr. Allen's own admission, the tests he performed merely determined that the substance was marijuana which contained

the drug THC. Therefore, Mr. Allen's tests are conclusive only as to the genus of the substance tested, not as to its species.

Taxonomy is the science of classifying plant life, a field which requires the practitioner to be qualified to testify as to plants' varying characteristics; this is the field in which Dr. Anderson is highly qualified and holds a doctoral degree. Dr. Anderson proffered testimony regarding the history and classification of Cannabis, the plant's anatomy, characteristics, structure and functional variations. He explained to the court the familial structure of Cannabaceae, the plant family of which Cannabis is a member. This family contains two genii(the next lower level of the family structure) one of which is the genus Cannabis. Cannabis, according to Dr. Anderson, has three species: sativa L., known since

1753; indica Lam., known since 1783; and ruderalis, known since 1924. Dr. Anderson testified that all three of the Cannabis species contain the chemical, tetrahydrocannabinol, an hallucinogenic.

The trial court, after having heard the evidence proffered by Dr. Anderson, rejected his testimony, determining that such evidence was irrelevant. The trial court then instructed the jury that if it found the plant substance which had been accepted into evidence to be marijuana, regardless of what species of marijuana it might be, it would be a Schedule I Controlled Substance under the laws of the United States. The court erred in so instructing the jury.

The definition of "marijuana", pursuant to 21 U.S.C. § 802 (15) specifies that substance as "Cannabis sativa L."

Though at the time Congress defined the word "marijuana",it was knowledgeable of the fact that the genus cannabis had several species, it did not define the word "marijuana" to include any species other than sativa L.

Deprived by the trial court of the opportunity to prove before the jury that the substance imported by petitioners was not the controlled substance, "Cannabis sativa L.", as defined in 21 U.S.C. § 802 (15) and prohibited pursuant to 21 U.S.C. §§841 (a) (1), 952 (a), and 960, petitioners were denied their Constitutional right to due process of law as afforded by the Fifth Amendment to the United States Constitution. Petitioners were denied fundamental fairness by being prevented from proving to the jury by presentation of expert taxonomic testimony that they had not in fact imported that substance which was proscribed by law.

Whereby, petitioners were found guilty by a jury of unlawfully importing the prohibited substance, Cannabis sativa L., due to the trial court's refusal to permit petitioners the opportunity to present a full and complete defense.

Rule 104 (b) of the Federal Rules of Evidence, which is accorded statutory effect, provides:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

The foundation evidence presented by the petitioners was sufficient to support a finding of fulfillment of the condition as evidenced in the trial transcript. The advisory committee's note accompanying Rule 104 (b) states, in relevant part, "The judge makes a preliminary deter-

mination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted.[emphasis added]." Therefore, the judge erred in not permitting the evidence to go to the jury. The judge usurped the fact finding role of the jury by resolving a crucial material fact which should have been left to the jury to resolve.

1. Were the petitioners denied due process of law as a result of:

b.) the lower courts' holdings that as a matter of law, all cannabis, regardless of the species, is within the definition of marijuana, when Congress has limited the definition to all of the parts of the plant Cannabis sativa L. whether growing or nor, with certain exceptions?

There is a split of authority in the field of taxonomy as to whether there are in fact different species in the Cannabis genus. Enough evidence was presented at petitioners' trial to support the position that there is in fact more than one species of marijuana. Congress was aware of this at the time it enacted the statutes under which petitioners were convicted. The apparent incongruity in Congress' action presents a question as to what it actually intended to proscribe through the statutes here involved. The resolution of this lies not with the judiciary but with the legislative branch.

There has long continued between the prosecution and the defense in cases involving 21 U.S.C. § 802 (15) a controversy about whether Congress was aware of the different species of marijuana when it enacted the definitional statute, 21 U.S.C.

802 (15) in 1970, and if so, whether Congress intended to include under the statute's proscription only sativa L., excluding all other species.[1/]

---

1/ During the course of the 1937 House hearings on the Marijuana Tax Act, the Commissioner of the Treasury Department's Bureau of Narcotics, Harry J. Anslinger, testified that "marijuana is the same as Indian Hemp, Hashish", and that "marijuana is known as cannabis, Cannabis americana, or Cannabis sativa. Marijuana is the Mexican term for Cannabis indica." Hearings on H.R. 6385 before the House Committee on Ways and Means, 75th Congress, 1st Session, 18 and 19 (1937). The above fine distinctions notwithstanding, Mr. Anslinger's testimony would appear to be somewhat less than precise, since he had great difficulty in other portions of his statement in distinguishing botanical labels, chemical composition, and other factors readily ascertainable by a taxonomist or botanist.

A former head of the Agriculture Department's Fiber Section, J.H. Dewey, gave testimony to the same effect as Anslinger's. "There is only one species known as hemp," making reference to Cannabis sativa. Ibid. at 55.

However, Mr. Dewey was contradicted by Dr. S.L. Hilton, who appeared as a representative of the American Pharmaceutical Association, when Dr. Hilton used the term "Cannabis indica" throughout his testimony before the same Committee. Ibid. at 121 to 122.

Cognizance in Congress of the different species of marijuana became readily apparent

In light of the readily apparent awareness in Congress of the polytypic nature of marijuana in 1970, when Congress enacted 21 U.S.C. § 802 (15), it is manifestly clear that Congress' intent was not to encompass all

---

when, one year later, in 1938, the proposed Uniform Narcotics Act came before it. Although there had been no great advance in expert understanding of the botany of the Cannabis plant, the National Conference of Commissioners on Uniform State Laws which drafted the Act made specific reference to species of Cannabis other than sativa L.

There were six drafts before a final was accepted; all but three drafts made reference to numerous species of marijuana. The first draft mentioned both Cannabis indica and Cannabis sativa. The third and fourth drafts included a third species, Cannabis americana.

It is an important fact in this controversy also that Congress enacted 21 U.S.C. § 209, prohibiting the sale or possession of Cannabis indica in 1915, indicating its recognition of a species separate and apart from sativa L. fifty five years prior to the 1970 Act in which marijuana is defined to include only sativa L.

Thus, it is reasonable to assume that at least as early as 1932 when the Commissioners finalized the Uniform Narcotics Act, they were cognizant of the several species of marijuana, and that they consciously decided to exclude all species but sativa L.,for whatever reasons, from the Act. Clearly, Congress has long been aware of the polytypic nature of Cannabis and could easily have remedied any ambiguity, had it the desire to do so.

species of marijuana when it referred to Cannabis sativa L. in the statute.

In order to summarily dispose of the argument concerning different marijuana species, many courts have cited Leary v. United States, 295 U.S. 6 (1969) to support the proposition that there is in fact only one species of marijuana, thus conveniently ignoring the diversity of opinion and concluding that which Congress itself has not. However, the Court in Leary, supra, was not directing itself to the issue of species and chose instead to discuss the issue of whether a statutory presumption was constitutional. Thus, the Court in Leary, supra, never revealed its resolution of the diversity in opinion regarding differing species. In dictum the Court stated in Leary, 295 U.S. at 50:

> As for appearance, [emphasis added] it seems that there is only one species of marijuana and that even experts are unable to tell by eye where a particular sample was grown.

Thus, it appears that the issue of "species" has never been resolved by the Supreme Court.

The government argues that it would be illogical for Congress to prohibit the importation of only sativa L. and not indica Lam., or ruderalis Gan., also species in the genus Cannabis. However, in U.S. v. Moore, 446 F.2d 448 (1971), the court discussed 21 U.S.C. § 209,[2/] (§7 of the Act of March 3, 1915, 38 Stat. 820) and found the prohibition by Congress of a particular species to be a logical distinction. In Moore, the appellate court supported the district court's contention that "it was intended to prohibit the transfer of [Cannabis indica]in the United States consular districts in China." 446 F.2d 448 at 451. The Third Circuit in

---

2/ "It shall be unlawful for any person, firm, or corporation whose permanent allegiance is due to the United States to sell or deliver to any other person any of the following described substances, or any poisonous compound, combination, or preparation thereof, to wit: ...the essential oils of cannabis indica..."

Moore chose to dodge the issue of species variations by following the dictum in Leary v. U.S., 89 S. Ct. 1532 (1969) to the effect that there is only one species of marijuana, but it added that there were to be found many physical differences in the plants grown in different areas of the world. To find that it does not appear rational for Congress to direct its prohibition to ban the import of only sativa L. (that species which is most prevalent in and around the United States) into the United States in relation to 21 U.S.C. § 802 (15), but to find that it was rational for Congress to focus its prohibition on Cannabis indica (that found most prevalent in China) in the United States consular districts in China, while dealing with 21 U.S.C. § 209, is irrational.

Aside from the inconsistency in these statutes, the cases, relied upon by the

government, that have supported the position that it was Congress' intent to make 21 U.S.C. § 802(15) all encompassing, have not been precisely reasoned.

In U.S. v. Honneus, 508 F.2d 566 (1974), the court rejected the appellant's suggestion that sativa L. was selected because of an intention to deal only with the type most commonly grown in America, believing that it was not borne out by the legislative record. The court stated that;

> "Such an approach would have amounted to exemption of material from easily procurable plants having the same properties as the one regulated. We are persuaded that Congress adopted 'Cannabis sativa L.' believing it to be the term that scientists used to embrace all marijuana-producing Cannabis; the other named sorts were not seen as separate Cannabis species." 508 F.2d 575.

However, as discussed above, the court in Moore, supra, without hesitation, utilized the same argument which this court rejected when it discussed the selection by Congress of a single species prohibition only treating

with Cannabis indica when dealing with 21 U.S.C. § 209,which related to the intent to prohibit the transfer of Cannabis in U.S. consular districts in China.

The inconsistencies between these two cases establish such an uncertainty about them that the ordinary man is just left to ponder.

In United States v. Walton, 514 F.2d 201,202 (1975), the court stated that,

> "since the District Court did not make findings of the fact on the point [of whether there was more than one species of marijuana] and rejected the Walton's proffer of proof, we must assume that more than one species of marijuana is extant."

However, the Court fallaciously reasoned that although expert opinion may have existed at the time Congress passed the Marijuana Tax Act that marijuana was polytypic. The Walton court declared on this issue, 514 F.2d at 204:

> [Expert opinion]...is of no relevance to the intent of Congress, since the

> fact was not popularly known and since Congress is not held in the process of statutory construction to what it could have known but to what it did in fact know." 514 F.2d 204.

The purpose of holding Congressional hearings was to obtain the expert knowledge which Congress lacked and such was accomplished during the hearings on the Marijuana Tax Act.

The Court stated that Congress' purpose of banning marijuana was to ban THC. Perhaps, but if so, Congress could have easily included in the statute all marijuana containing THC or specifically prohibited THC. Nonetheless, it is not for the Courts to do that which Congress neglected to do.

In United States v. Gaines, 40 F.2d 690, 691 (1974), the government's expert chemist agreed that three species of marijuana are in existence, i.e., Cannabis sativa L, Cannabis indica and Cannabis ruderalis; the chemist was unable to differentiate between

the three.

It was argued in Gaines that the court's refusal to give the jury an instruction containing the statutory definition of marijuana deprived the jury of considering whether the government's expert was sufficiently trained and whether he sufficiently tested the substance to prove beyond a reasonable doubt that in fact the substance examined was Cannabis sativa L. and not Cannabis indica. To dispose of this issue, the Court cited the Third Circuit case of United States v. Moore, supra, a case which lacked sound reasoning.

Thus, the legislative history and judicial decisions are not truly dispositive of the issue of whether Congress intended to prohibit all species of marijuana. Although perhaps it was not rational for Congress to prohibit only sativa L., Congress does not always legislate with the precision that is necessary in the case of criminal statutes. However, this is

of no concern to the judiciary.

> "We do not pause to consider whether a statute differently framed would yield results more consonant with fairness and reason." Anderson v. Wilson 289 U.S. 20, 27 (1933).

The contention that Congress' intent was unclear as to the realm of the statute is further supported by the subsequent enactment of the District of Columbia Code. Here Congress was somewhat more thorough with its legislative drafting than with its drafting of the statutes which the petitioners were found guilty of violating. The pertinent parts of 33 D.C.C. 401 (1973), state the following:

> "(m) 'Cannabis' includes all parts of the plant Cannabis sativa L. . . . including specifically the drugs known as American hemp, marijuana, Indian hemp, hashish, as used in cigarettes or in any other articles . . . .
>
> "(n) 'narcotic drugs' means . . . Cannabis . . . and every substance not chemically distinguishable from them . . . ."

Thus Congress either intended to correct that which they inadvertently omitted in the 1937 Act or had, in fact, intended to omit

other species of marijuana and now intended to extend it. Whichever the case may be, it is certainly an indication that Congress intended to clear up any ambiguity,if such was the case, or to make the statute all-encompassing as to the District of Columbia Code.

It must be recognized that the Congressional hearings for the Marijuana Tax Act of 1937,which have been relied upon by the courts to rule that the Congressional intent was to include all marijuana in its definition of same in 21 U.S.C. § 802(15), enacted in 1970, are antiquated.

This antiquity is obvious by the contradicting positions in the scientific community relating to the polytypic nature of marijuana, reflective of the increasing acceptance of marijuana's polytypic nature;all of which was laid out to the Congress in a great variety of sources, including their own multiple hearings and the widespread public airing that this issue has received.

Nonetheless, Congress failed to amend 21 U.S.C. § 802(15) when that section was enacted in 1970. This may be due to the fact that Congress recognized that the courts have remedied the problem of vagueness; however, regardless of Congress' implicit approval of such judicial action it does not vitiate the violation of exclusive Congressional jurisdiction of the legislative functions of government by the judiciary.

As stated in U.S. v. Collier, 14 Cr. L. 2501 (D.C. Super. Ct., 1974), where the Court held that the words "Cannabis sativa L." did not include other species of the genus cannabis,

> "Legislative omissions in criminal statutes can only be remedied by legislative action. In our tripartite scheme of government, Courts are not permitted to effectuate what appears to be legislative intent by extending the reach of a penal statute beyond its plain language."

And as stated in U.S. v. Rothberg, 480 F.2d 534 (1973),

> "A legislature, under a misapprehension as to the object described by it, cannot be corrected by a criminal court's amendment of the statute in regard to the term in the statute."

Thus, the courts have clearly gone beyond their judicial authority and committed that which has been proscribed by the United States Supreme Court, specifically, extending the realm of a statute beyond that which is clear on its face.

The trial court, in which petitioners were tried, committed the error of interpreting 21 U.S.C. § 802(15) where the language of the statute was unambiguous.

> "The most fundamental principle of the law of statutory construction is that if a statute is plain, certain, and free from ambiguity, the words of the statute control its ambit. Resort to extrinsic 'guides', such as 'legislative history' is prohibited."
> U.S.v.Wiltberger, 18 U.S. 76 (1820).

> "If the language of a statute is unambiguous, the statute must be accorded the expressed meaning without deviation since any departure would constitute an invasion of the province of the legislature of the judiciary."
> Crawford, Construction of Statutes (1940) at p. 249.

> "Statutory 'interpretation' cannot be used to vary the clear meaning of the text of a statute."
> Fischer Flouring Mills Co. v. U.S. 270 F.2d 27 (1958).

The pertinent part of 21 U.S.C. § 802(15) reads:

> "The term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin . . . . [with unrelated exception]."

There is no indication of any ambiguity in the words, "Cannabis sativa L.", specific language of the statute that has been interpreted by the lower courts; not, at least until one examines the legislative history. That is what the courts have consistently done since they were presented with the issue, of whether "sativa L." means all marijuana. However, as courts began to examine the Congressional intent to discover whether sativa L. was intended to include all marijuana., they found no ambiguities in the term,"sativa L." "sativa L." is

sativa L. whether it describes a species or the locale from where it originated. Then came the judiciary's interpretation of Congress' intent relating to a statute which by the basic principles of legislative construction needed no interpretation; the courts pulling themselves up by their own bootstraps.

Arguendo, the term "sativa L." is ambiguous,requiring the courts to examine Congressional intent. If the judiciary is incapable of determining the realm of 21 U.S.C. § 802(15),how can the legislature or judiciary expect the ordinary man to be aware of what Cannabis sativa L. encompasses?

As stated in Fischer Flouring Mills Co. v. U.S., 270 F.2d 27, 30 (1958):

> "There is no room for interpretation or constuction. The clear language of the enactment cannot be destroyed or abrogated because the judges think the results are improvident or impolitic. The courts have no such mandate." See U.S. v. Iselin, 270 U.S. 245 (1926).

The foregoing mandates the conclusion herein

that the lower courts' holdings,that,as a matter of law, all Cannabis, regardless of species, lies within the definition of marijuana,when Congress has limited the definition, violated established principles of law and as a result denied petitioners due process of law.

1. Were petitioners denied due process of law as a result of:

c.) being deprived of their right to receive fair and adequate notice of criminal liability due to the uncertainty of 21 U.S.C. § 802(15), should it be held to encompass all species of marijuana?

Arguendo, the lower court properly determined that the intent of Congress was to include all species of marijuana within the definition provided in 21 U.S.C. § 802(15); however, as written, the statute was too uncertain to have put the petitioners on notice of criminal liability.

In 1915,Congress enacted 21 U.S.C. §209, which prohibited the sale or delivery of Cannabis indica. Subsequent to that Act, Congress enacted legislation[1] which banned the possession, sale or importation of Cannabis sativa L. It is not unreasonable for the ordinary man, who is not required to research Congressional legislative history, to believe that Cannabis indica and Cannabis sativa L. are two different substances.

Besides the inconsistent terms of these statutes, the ordinary man could realize that 21 U.S.C. § 209,which prohibits Cannabis indica, was intended to apply to marijuana transactions in China (see Moore, supra)(a jurisdictional concern of Congress) and that sativa L.,mentioned in 21 U.S.C. § 802(15),was intended to mean all marijuana, although it is sativa L. that is found

---

1 21 U.S.C. §§ 841, 952, and 960.

in the locale of the United States (a definitive concern of Congress, as opposed to the jurisdictional concern in Moore). No ordinary man could decipher the meanings of these statutes and, as such, the petitioners were deprived due process of law.

If not vague on its face, the petitioners, nonetheless were not fairly and adequately forewarned as to criminal liability.

As stated in United States v. Honneus, supra, at 575, 576 assuming that Congress intended to include all marijuana, the issue then is whether the plain language of the statute was adequate to forewarn the petitioners of the crimes for which they were later charged.

In order to determine whether the definition was adequate to forewarn the petitioners, the common usage of the terms must be sought out.

In United States v. Rothberg, supra, the court stated,

> "that to determine whether a criminal statute fairly apprises potential violators of

> the nature of acts prohibited, it may be that we should consider whether the meaning of terms has in general usage so changed since the enactment as not at the time of the offense to give such fair notice . . . ."

The court continued, directing the reader to Leary v. U.S., supra:

> "At the time of the enactment and amendment of the statutes in 1937 and 1956 and up to the time of the offense, there is no question but that the lawmakers, considered that there was only one species of marijuana so that this Afghan hemp was included within the statutory definition."

However, as indicated earlier, Leary did not hold that there was only one species of marijuana. The court in Rothberg merely professed the conclusion of one species. Thus, it is not apparent that wide acceptance of the monotypic species argument held at the time when the statute was enacted and amended, or when the violation occurred.

Certainly with all the recent litigation relating to this matter and the advancement in the fields of botany and taxonomy, it is very likely that the usage of the word has changed.

As evidenced from the testimony received

during the House hearings on the Marijuana Tax Act of 1937 and as held consistently by the courts, the terms Cannabis indica Lam., sativa L. and ruderalis Gam., although not known by the overwhelming majority of people to be species of marijuana, if such be the case, the majority of people were cognizant that these names indicated from where the marijuana originated.

As such, those to whom the legislation was directed, by the clear wording of 21 U.S.C. § 802(15) and its related statutes, were put on notice that marijuana coming from those geographical areas where marijuana was known as "sativa L." would be prohibited in this country.

Regardless of the fact that it would be irrational for Congress to prohibit marijuana originating from particular areas and not other locales,and the possibility that the statute, as written, could create constitutional problems, the statute, is nonetheless

clear on its face, and the judiciary is not to concern itself with those matters unrelated to the judiciary, (i.e., irrationality of Congress and potentiality of constitutional problems.)

It has long been settled that criminal statutes are to be strictly construed, in that one "is not to be subjected to a penalty unless the words of a statute plainly imposes it." United States v. Campus-Serrano, 404 U.S. 293 (1971). As explained by Justice Marshall in United States v. Wiltberger, 18 U.S. 76 (1820):

> "The rule that penal laws are to be construed strictly is perhaps not much less old than the construction itself. It is founded on the tenderness of the law for the rights of the individual; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the court, which is to define a crime, and order its punishment." 18 U.S. 95.

As mandated in Smith v. United States, 260 U.S. 1 (1959), criminal statutes and rules must be given strict interpretation in favor

of defendants where substantial rights are involved. And as discussed in United States v. Morris, 39 U.S. 464 (1840), the Court may not extend a criminal statute beyond the plain meaning of its word, for such statutes must be strictly construed.

It is clear that Cannabis sativa L. is indicative of where the marijuana originated; this is general knowledge. As evidenced by legislative hearings and judicial decisions, the statute prohibits only that marijuana which is referred to as Cannabis sativa L. in the country from where it originated. As discussed above, it is beyond the power of the court to prohibit any marijuana which is not referred to as Cannabis sativa L.

2. Regardless of Congressional intent, by operation of the well established and clearly drawn principle of statutory construction known as Expressio unius exclusio alterius, where Congress precisely and specifically prohibits a form of conduct, and the persons and things to which it refers are designated, it is beyond the province of the judiciary to prohibit other similar classes or categories not designated by the statute.

Expressio unius est exclusio alterius is a well established and clear principle of statutory construction.

> "As the maxim is applied to statutory interpretation, where a form of conduct,[2] the manner of its preformance and operation,[3] and the persons[4] and things[5] to which it refers are designated, [emphasis added] there is an inference that all omissions should be understood as exclusions.[6]" Sutherland Statutory Construction, Vol. 1, § 47.23. [Footnotes omitted]

As previously discussed, the Congress had before it ample evidence to the effect that marijuana is polytypic and that more than one

species of marijuana is available and used. Since the Congress did not choose, for whatever reason, to enumerate any additional species other than Cannabis sativa L., and especially in light of its apparent recognition of the polytypic nature of marijuana, as indicated by its statutory enactment of 33 D.C. Code, 401(m), as also previously discussed, the application of expressio unius est exclusio alterius seems clear.

It is not within the province of the judiciary to expand upon this rather clear and specifically narrow designation of the prohibition of Cannabis sativa L.

Nowhere in the statute in question can any expression to the contrary of this rule be found.

## CONCLUSION

However desirable it may be from a public policy standpoint for this Court to permit the

interpretation of 21 U.S.C. § 802(15) to broadly cover all species of marijuana, it would do so at great cost, i.e., the destruction of well established principles of law. At stake is not only the well established principle of statutory construction, exclusio unius, etc., but also the violation of separation of powers by permitting the impermissible expansion of judicial power to amend criminal statutes. The greatest hallmark of this court has been its willingness to recognize its overriding obligation for judicial restraint. This case squarely presents the opportunity for the court to reaffirm that doctrine.

Respectfully submitted,

Donald E. Santarelli,

1025 Connecticut Avenue, N.W.

Washington, D.C. 20036

Robert B. Thompson,

P. O. Box 677,

Gainesville, Georgia 30501

Philip J. Starr,

1025 Connecticut Avenue, N.W.

Washington, D.C. 20036

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing application of Arthur Velasco, et al., were deposited in a United States mailbox with airmail postage pre-paid, addressed to: Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; and to: The Honorable Mark W. Buyck, Jr., United States Attorney, United States Courthouse, Columbia, South Carolina.

All parties required to be served have been served.

This the 18th day of
August, 1976.
Donald E. Santarelli

# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

75-1284/5/6/7/8

United States of America,

Appellee.

vs.

Arthur Velasco, et al.

Appellant.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA.

---

Upon consideration of the appellants' suggestion for hearing en banc and the response to the suggestion for hearing en banc, by counsel,

IT IS ORDERED that the suggestion for hearing en banc is denied.

For the Court-
by Direction

/s/ William K. Slate, II

Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1284

United States of America,

Appellee,

vs.
Arthur Velasco,

Appellant.

No. 75-1285

United States of America,

Appellee,

vs.
Ben Kade Tatum and
Wayne B. Ferguson,

Appellants.

No. 75-1286

United States of America,

Appellee,

vs.
Charles Vance Moody,

Appellant.

No. 75-1287

United States of America,

Appellee,

vs.
Joseph P. Pruitt,

Appellant.

No. 75-1288

United States of America,

Appellee,

vs.
Frank Joseph Zambito,

Appellant.

---

Appeals from the United States District Court for the District of South Carolina, at Columbia. J. Robert Martin, Jr., District Judge.

---

Submitted: February 18, 1976
Decided: June 3, 1976

---

Before HAYNSWORTH, Chief Judge, FIELD and WIDENER, Circuit Judges.

---

(Robert B. Thompson [Court-appointed in Nos. 75-1285 and 75-1286] and Herbert Shafer on brief for Appellants. Mark W. Buyck, Jr., United States Attorney, and Thomas P. Simpson, Assistant United States Attorney, on brief for the Appellee.)

---

PER CURIAM:

Appellants in the above-styled cases were convicted of illegal importation of marijuana, a controlled substance, in violation of 21 U.S.C. §§952(a) and 960, and of conspiracy to illegally import marijuana, in violation of 21 U.S.C. §963. Appellant Fergu was also convicted of

possession of marijuana with intent to distribute, in violation of 21 U.S.C. §841(a)(1). The sole issue on this appeal is whether the trial court erred in ruling that as a matter of law all species of marijuana are included within the statutory definition of marijuana set forth in 21 U.S.C. §802(15).

Section 802(15) provides in pertinent part: "The term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not . . . ." At trial the defendants proffered testimony by an expert witness that the marijuana exhibited by the government was not Cannabis sativa L., but rather another species of marijuana, Cannabis indica. The judge rejected this proffer of testimony, ruling that if the jury found the plant to be marijuana, as a matter of law it was immaterial whether it was sativa, indica,

or any other species. Appellants contend that this was error, in that the statutory definition of marijuana limits the applicability of the criminal statutes to Cannabis sativa L.

The argument advanced by appellants has been advanced and rejected in many previous appeals before this court and other federal appeals courts. See United States v. Honneus, 508 F.2d 566 (1 Cir. 1974), cert. denied, 421 U.S. 948 (1975); United States v. Kinsey, 505 F.2d 1354 (2 Cir. 1974); United States v. Rothberg, 480 F.2d 534 (2 Cir. 1973), cert. denied, 414 U.S. 856 (1973); United States v. Moore, 446 F.2d 448 (3 Cir. 1971), cert. denied, 406 U.S. 909 (1972); United States v. Sifuentes, 504 F.2d 845 (4 Cir. 1974); United States v. Gaines, 489 F.2d 690 (5 Cir. 1974); United States v. King, 485 F. 2d 353 (10 Cir. 1973); United States v.

Ludwig, 508 F.2d 140 (10 Cir. 1974); United States v. Walton, 514 F.2d 201 (D.C. Cir. 1975). We decline to depart from this settled line of authority and our own prior decisions on this issue.

Accordingly, we dispense with oral argument and affirm the judgments of conviction.

A F F I R M E D.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

---

No. 75-1284

---

UNITED STATES OF AMERICA, Appellee,
versus
ARTHUR VELASCO, Appellant.

---

No. 75-1285

---

UNITED STATES OF AMERICA, Appellee,
versus
BEN KADE TATUM and
WAYNE B. FERGUSON, Appellants.

---

No. 75-1286

---

UNITED STATES OF AMERICA, Appellee,
versus
CHARLES VANCE MOODY, Appellant.

---

No. 75-1287

---

UNITED STATES OF AMERICA, Appellee,
versus
JOSEPH P. PRUITT, Appellant.

No. 75-1288

UNITED STATES OF AMERICA, Appellee,
versus
FRANK JOSEPH ZAMBITO, Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia, J. Robert Martin, District Judge.

## ORDER DENYING REHEARING

Upon consideration of the petition for rehearing en banc on behalf of the appellants on June 16, 1976, together with the response of the United States filed on July 2, 1976, and being persuaded that this court's opinion handed down on June 3, 1976, is not erroneous,

NOW, THEREFORE, with the consent and approval of Chief Judge Haynsworth and Judge Widener, and in the absence of a request for a poll of the entire court, as provided by Appellate Rule 35(b),

IT IS ADJUDGED and ORDERED that the petition for rehearing is denied.

No. 76-246

# In the Supreme Court of the United States

OCTOBER TERM, 1976

---

ARTHUR VELASCO, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ROBERT H. BORK,
*Solicitor General,*

RICHARD L. THORNBURGH,
*Assistant Attorney General,*

MICHAEL J. REMINGTON,
*Attorney,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1976

---

No. 76-246

ARTHUR VELASCO, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A2-A6) is reported at 539 F. 2d 707.

### JURISDICTION

The judgment of the court of appeals was entered on June 3, 1976. A petition for rehearing *en banc* was denied on July 19, 1976 (Pet. App. A1). The petition for a writ of certiorari was filed on August 18, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether a ruling by the trial court, excluding proffered expert testimony concerning the different species of marihuana, deprived petitioners of due process.

## STATUTE INVOLVED

21 U.S.C. 802(15), provides:

> The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

## STATEMENT

After a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted on one count of conspiracy unlawfully to import a controlled substance (marihuana) into the United States, in violation of 21 U.S.C. 963, and on one substantive count of unlawful importation of marihuana, in violation of 21 U.S.C. 952(a) and 960. Petitioner Ferguson was also convicted of possession of marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] Petitioners Zambito, Pruitt and Moody were each sentenced to four years' imprisonment on the conspiracy count and four years on the substantive count, to be served consecutively. Petitioners Velasco and Tatum were

[1]Three of the indicted coconspirators (Bass, Dove and Wood) were acquitted, and two others (Cochran and Evans) have not yet been arrested.



sentenced to consecutive terms of two years' imprisonment on the two counts. Petitioner Ferguson was sentenced to three consecutive one-year terms. The court of appeals affirmed *per curiam* (Pet. App. A2-A6).

The indictment in this case charged petitioners and others with conspiracy to import marihuana into the United States (Count I) and importation of approximately 15,000 pounds of marihuana into the United States (Count II) (App. 1-5).[2] The indictment also charged petitioner Ferguson and others with possession of approximately 15,000 pounds of marihuana with intent to distribute (Count III) (App. 5).

At trial the government introduced the expert testimony of a chemist, Andrew C. Allen. Allen testified that he analyzed the seized contraband by subjecting the plant matter to four different tests (App. 22-25). Based upon these examinations, Allen concluded that the substance in question was marihuana, specifically Cannabis sativa L. (App. 25, 44). Allen further stated that only one species of marihuana exists (App. 29).

The defense proffered the testimony of a taxonomist, Dr. Lauren C. Anderson, an expert in the identification and classification of plants. He testified that the seized drug was Cannabis (App. 69); that marihuana or Cannabis is of the plant family denominated Cannabaceae (App. 47); and that the genus Cannabis is polytypic, having three species (sativa, indica and ruderalis) (App. 47-56). His testimony indicated that the particular species could not be determined by the government's tests since the characterization of species is within the realm of the taxonomist and generally not within that of the chemist

[2]"App." refers to the appendix filed in the court of appeals, a copy of which we are lodging with the Court.

(App. 57-59). He also testified he could not tell with reasonable certainty to what species the seized drug belonged (App. 62).

The trial court held that Dr. Anderson's proffered testimony was inadmissible and instructed the jury "that the exact species of marijuana is immaterial under the law * * *" (App. 72).

## ARGUMENT

Petitioners contend (Pet. 18 *et seq.*) that the trial court, by improperly excluding proffered expert testimony concerning the different species of marihuana, prevented them from rebutting the government's proof that the substance in question was derived from Cannabis sativa L., the plant defined as marihuana in 21 U.S.C. 802(15). They argue that, as a matter of statutory construction, the reference to Cannabis sativa L. in 21 U.S.C. 802(15) excludes all other species of the plant and that the trial court's ruling denied them their right to fair and adequate notice and due process of law. The court of appeals below, like every court of appeals that has considered this "species" defense, properly rejected these contentions.

Affirming a similar denial of proferred testimony, the Court of Appeals for the Second Circuit has stated (*United States* v. *Rothberg*, 480 F. 2d 534, 536, certiorari denied, 414 U.S. 856):

> The most that the proffered proof could have established was that at the time of trial there was some and perhaps growing botanical opinion that Cannabis is polytypal and that a distinction can be made between Cannabis Sativa L. and Cannabis Indica Lam. * * * [U]p to the time of the offense, there is no question but that the lawmakers, the general public and overwhelming scientific opinion considered that there was only one species of marihuana * * *. *See* Leary v. United States, 395 U.S. 6, 50 * * *. Whether this is scientifically exact or not, the statute provided at the time of the offense a sufficient description of what was intended to be prohibited to give notice to all of the illegality of appellant's actions.



Accord, *United States* v. *Kinsey*, 505 F. 2d 1354 (C.A. 2).

That position has been adopted by every other circuit that has considered the issue. *United States* v. *Honneus*, 508 F. 2d 566 (C.A. 1), certiorari denied, 421 U.S. 948; *United States* v. *Moore*, 446 F. 2d 448 (C.A. 3), certiorari denied, 406 U.S. 909; *United States* v. *Gaines*, 489 F. 2d 690 (C.A. 5); *United States* v. *Burden*, 497 F. 2d 385 (C.A. 8); *United States* v. *King*, 485 F. 2d 353 (C.A. 10); *United States* v. *Walton*, 514 F. 2d 201 (C.A. D.C.); compare *United States* v. *Lewallen*, 385 F. Supp. 1140 (W.D. Wis.). Moreover, the legislative history of the Marihuana Tax Act of 1937, 50 Stat. 551, the amendment of 1954, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236, demonstrate that Congress intended to outlaw all plants known as marihuana to the extent that those plants possessed the active ingredient tetrahydrocannabinol (THC).[3] The evidence

---

[3]See, *e.g.*, H.R. Rep. No. 792, 75th Cong., 1st Sess. 3-4 (1937); S. Rep. No. 900, 75th Cong., 1st Sess. 4 (1937); Hearing on H.R. 6906 before a Subcommittee of the Senate Committee on Finance, 75th Cong., 1st Sess. 14, 23-24 (1937); Hearing on H.R. 6385 before a Subcommittee of the House Committee on Ways and Means, 75th Cong., 1st Sess. 18-42, 55, 60-61, 71-72, 76-78, 90-122 (1937); H.R. Rep. No 91-1444 (Part 1), 91st Cong., 2d Sess. (1970); 116 Cong. Rec. 33603, 33667, 35484-35559, 36651, 36655, 36880, 36885 (1970).

in this case showed that the seized drug contained THC (App. 69-70).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

RICHARD L. THORNBURGH,
*Assistant Attorney General.*

MICHAEL J. REMINGTON,
*Attorney.*

NOVEMBER 1976.

DOJ-1976-11